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No. 246.

STEAMSHIP "CHATTAHOOCHEE."

ABRAM W. HENDRY ET AL., *Appellants*,

vs.

THE OCEAN STEAMSHIP COMPANY, *Claimant*.

BRIEF FOR CLAIMANT OF STEAMSHIP.

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Supreme Court of the United States.

No. 246.

STEAMSHIP "CHATTAHOOCHEE."

ABRAM W. HENDRY ET AL., *Appellants, Libellants,*

vs.

THE OCEAN STEAMSHIP COMPANY,

CLAIMANT OF STEAMSHIP "CHATTAHOOCHEE, *Appellee.*

BRIEF FOR APPELLEE.

THIS is a libel *in rem* in admiralty for collision, brought in the United States District Court for Massachusetts; later appealed to and decided in the Circuit Court of Appeals for the First Circuit; and then brought before this Court upon a writ of *certiorari.*

The libel seeks to recover $34,500 for total loss of the schooner "Golden Rule," freight, cargo of sugar and molasses and personal effects, sunk by collision with the steamship "Chattahoochee," southeast of Nantucket Shoals, about four o'clock in the morning of July 20, 1894.

STATEMENT OF THE CASE.

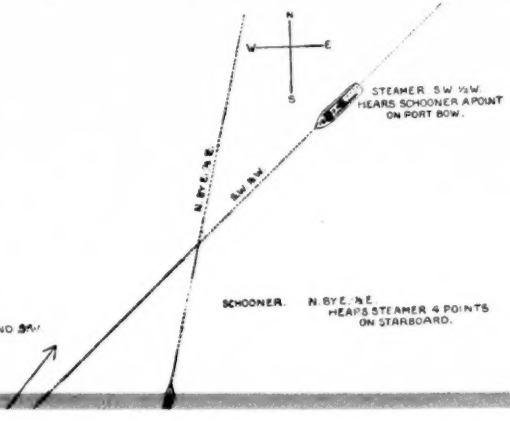
The collision occurred about eighteen miles southeast of Nantucket South Shoal Lightship, about 4.10 A.M. by the schooner's time, — about four o'clock by the steamer's (Standard) time. Day had broken, sunrise being at about 4.40. The weather was foggy, requiring fog signals. The schooner went into the fog about three o'clock, the steamer about 12.30 o'clock.

The wind was southwest.

The schooner was a two-masted topsail schooner of Liverpool, Nova Scotia, of one hundred and ninety-nine tons burden, rigged with twelve sails, including one double square sail on the foremast. Her length over all was one hundred and ten feet. She was on a voyage from Porto Rico to Boston, with a full cargo of molasses and sugar, and at the time of collision was sailing on the port tack with the wind free, on a course north by east one-half east, having the wind five or six points abaft the beam. She was under all sail except one-half of the square sail forward, taken in about two o'clock A.M. Her speed is disputed.

The steamship is an iron ship of eighteen hundred and eighty-seven tons burden, with a length of about three hundred feet, running at the time on the line between Boston and Savannah. She left Boston in the afternoon of the 19th, and when off Cape Cod the master decided to take the outside passage by Nantucket. Before the collision the steamship was eighteen miles off the South Shoal Lightship, on a course southwest one-half west, proceeding at a rate of ten or eleven miles an hour, blowing her whistle at the required intervals after 12.30 o'clock. The master and the first officer with the quartermaster were in the pilot house, and a lookout was stationed forward.

The two vessels were therefore approaching on converging lines, at an angle of three points, as shown in this diagram: —



The schooner heard the steamship's whistle off the starboard bow: Mullins, the mate, says two or two and one-half points off starboard bow (Mullins, Int. 61, Record, p. 35); the master, when he located it, puts it four points (Page, Int. 63, p. 16); Williams says four points (Williams, Int. 37, p. 62); Wilson two and one-half or three points (Wilson, Int. 63, p. 56); Abbott, the cook, puts it six points on starboard beam (Abbott, Ints. 26–27, p. 47). It is safe to say that the steamer was then well to starboard.

The schooner's witnesses substantially agree upon the distance from the steamer when the latter was seen. Mullins says he saw steamer four or five lengths, equal to four hundred or five hundred yards (Mullins, Dep., Ints. 73–74, p. 36). Captain Page puts the distance two thousand feet (Page, Int. 65, p. 65). As they both testify that the steamer was heard fifteen or twenty minutes before the collision, and several blasts of the whistle were heard, it is probable that the steamship, with her black hull well out of water, was seen at a greater distance than they think. The schooner kept her course and speed until the collision.

The steamer, at five minutes before four, heard a single blast of a fog horn about a point off the port bow. The order was immediately given and obeyed to stop and reverse, and the wheel was put hard-a-port, in order to locate the sound. Headway was rapidly reduced to four or five miles an hour, when the sails of the schooner were seen on the port. The steamship was then swinging to starboard under her port helm, and the order was given full speed ahead, for the purpose of clearing the schooner. The schooner kept her course, and the vessels came together, the steamer striking the schooner forward of the foremast on the starboard side.

The schooner almost immediately sank with her cargo and property on board, and became a total loss. The steamship was uninjured.

The schooner alleges fault in the steamship in

(1) *proceeding at an immoderate rate of speed in a fog;*
(2) *not stopping and reversing, as required by law;*
(3) *not having a proper lookout;*
(4) *changing to starboard instead of to port;*
(5) *trying to cross the bow of the schooner.*

The steamship alleges fault in the schooner in

(1) *proceeding at an immoderate rate of speed in a fog;*
(2) *not keeping a proper lookout;*
(3) *not blowing the fog horn, as required by law;*
(4) *not changing to port by starboarding the wheel, after seeing the steamship swinging under the port wheel.*

At the trial in the District Court upon the evidence as reported in the Record, the Court decided that both vessels were in fault, — the steamship for proceeding in the fog at the rate of eleven miles an hour, and the schooner for proceeding at a speed of seven or eight knots; the speed of both vessels being found by the Court to have been immoderate. The Court thereupon decreed that the steamship, which was uninjured, should pay one-half the value of the schooner and freight lost, and the full value of the cargo, with the usual right to recoup.

Opinion, Record, pp. 10, 11.

After the interlocutory decree the parties agreed that the value of cargo and personal effects of passenger on the schooner was $15,736.05; that the value of schooner, freight, and effects of master and crew was $16,829 (Agreement regarding damages, Record, p. 8).

The Court thereupon entered a final decree against the steamship for the full agreed value of the cargo lost, with interest, and for one-half the value of the schooner, freight, and effects

lost, with interest, deducting from such one-half by way of recoupment one-half the value decreed for loss of cargo, leaving the balance due owners of schooner $591.87.

Final Decree, Record, pp. 7–9.

From this decree for divided damage, upon the finding of mutual fault, the claimant of the steamship has not appealed. The decree stands as against her. The libellants, as owners of the schooner, appealed to the Circuit Court of Appeals, and alleged as error in the opinion and decrees of the District Court, the findings in substance as follows: —

(1) That the collision was caused by the fault of both vessels, instead of alone by the fault of the steamship.

(2) That the schooner was going at a rate of seven to eight knots per hour, instead of not even four knots.

(3) That the schooner was going at more than a moderate rate of speed in a fog.

(4) That the schooner was in fault, instead of finding that she was wholly without fault, and entitled to recover full damages.

(5) That the steamship was entitled to recoup one-half of the damages suffered by the cargo of the schooner from the damages found for the owners of the schooner, instead of ruling that, under the Act of Congress, February 13, 1893 (Harter Act), no such right to recoup existed.

(6) The refusal of the Court to decree for the libellants for full damages, and to find the steamship alone at fault.

Assignment of Errors, Record, pp. 9–10.

The Circuit Court of Appeals affirmed in every particular of present consequence the decree of the District Court, and the appellants were granted the writ of *certiorari* to bring the record and the issues therein raised before this Court.

The two inferior courts agreed in substance in all findings of fact; and so far as the questions involved are issues of fact, the principle, quite recently reaffirmed, is applicable: "Their concurrent decisions upon a question of fact are to be followed unless clearly shown to be erroneous."

Compania de Navigacion *vs.* Brauer, 18 Sup. Ct., Reporter 12.
The *Conqueror*, 166 U.S. 110, 136.
Richmond, 103 *Id.*, 540.

The appellee respectfully calls attention to the issues raised under three principal heads: (1) *The fault of the schooner;* (2) *the right and propriety of equal division of damages, and* (3) *the effect of the Harter Act* (ch. 105, February, 1893) *upon the division of damages.*

I.

The Fault of the Schooner.

The faults of the schooner, upon which appellee relied, were (1) immoderate speed; (2) want of proper lookout; (3) not properly sounding the fog horn, and (4) not starboarding to avoid the collision.

Only the first of these faults was considered by either of the lower courts. Each court found the speed of the schooner to be immoderate, and therefore did not deem it necessary to decide the other issues presented and argued.

The District Court found the speed of the schooner "could not have been less than seven or eight knots an hour."

NELSON, J., Record, p. 11.

The Circuit Court of Appeals finds that the schooner's rig "gave her a very large spread of canvas, which made her fast on the course she was sailing. She was practically free, and her master admits that she was making substantially all the speed she was capable of, and that she could easily have shortened sail materially when she struck the fog and yet have kept her steerage-way and all the way necessary for all manœuvres which could reasonably have been anticipated."

PUTNAM, J., Record, pp. 104, 105.
The *Chattahoochee*, 74 Fed. Rep. 901, 902.

So far, therefore, as the question of moderate speed is a question of fact, depending upon the locality, denseness of the fog, ability to reduce speed, the refusal to do so, and the character and equipment of the vessel, — the decision of the two courts below is adverse to the schooner.

THE SPEED OF THE SCHOONER.

1. The collision occurred some eighteen miles southeast of the Nantucket Shoal Lightship. An examination of the nautical chart will show that this is a passageway between Nantucket and the Banks, and is one of the two travelled routes necessarily taken by every vessel coasting to the north or south of Cape Cod. It is known as the "outside" passage, as distinguished from Vineyard Sound, which is the "inside" passage. These

two passages are probably the most frequented waters on our coast. The fact that this steamship, only twelve hours out from Boston, was in this passage on her regular course shows that it is the regular outside passage for Boston and northern commerce. The schooner was directly in the track of this commerce, and her master knew that he was there, because he had his observation the previous noon and knew he was approaching land.

2. *It is submitted that the schooner in this channel was proceeding at a speed of at least seven knots an hour, or, as Judge Nelson found after seeing and hearing the witnesses, seven or eight knots.*

(*a*) The evidence from her crew is as follows: —

Williams (the lookout from two to four o'clock, and the best judge) says, going seven and one-half or eight knots, all through his watch (Ints. 113–114, p. 66).

Wilson (the lookout at four o'clock) says, going somewhere between six and seven miles (Int. 127, p. 59).

Mullins (the mate, not on deck until just before four o'clock) says, it may have been six knots, more or less (Int. 147, p. 40).

Abbott (the cook, with no opportunity to judge) says, six knots (Ints. 139, 140, pp. 52, 53).

(*b*) The schooner had a log dragging for the four hours just before the collision. It was taken in at four o'clock, and registered twenty-eight miles for the four hours, or an average of seven miles an hour.

Captain Page, Ints. 75–78, p. 17.
Mullins, Dep., Ints. 149–155, p. 40.

(*c*) The schooner was carrying all sail; that is, mainsail, gaff topsail, fore and aft foresail, and square sail, lower and upper

topsail, topgallant sail, stem staysail, and three jibs, except that one-half of this square sail on the foremast had been taken in sometime between twelve and two o'clock (Page, Ints. 159–162, p. 22). Mullins says it was taken in at eight o'clock (Mullins, Ints. 155–157, p. 40). "She was faster with that rig than a schooner of the same build" (Captain Page, Int. 146, p. 21). This half sail was taken in before it became foggy, because the master "didn't want to go too fast. It was not foggy then. I didn't want to get up on the coast until daylight" (Captain Page, Ints. 163–169, p. 22).

The schooner, then, made no change in her sails or speed when the fog shut in. Under her spread of canvas she was going as fast as the wind would take her.

(*d*) Wilson, the schooner's lookout, says the wind was "a good, nice breeze; a good wind, sir" (Wilson, Int. 126, p. 59). "Near about the same at four o'clock as at twelve" (*Id.*, Int. 144, p. 60). Captain Page admits that at two o'clock there was an eight-knot breeze (Page, Int. 37, p. 15).

(*e*) The evidence from the steamer confirms the statement of the schooner's witness, Williams. "The schooner was making a fuss in the water, going between seven and eight knots" (first officer Howlett, Ints. 60–62, p. 83). "By the breeze there, I should think she would be going about seven or eight knots. The breeze was about an eight-knot breeze from the southwest" (second officer Jensen, Ints. 23–24, p. 88). "She was going about seven or eight knots. I think she was going faster than the steamer" (Lookout Wall, Ints. 38–40, pp. 90–91).

(*f*) Captain Page does not agree with his own men, nor with himself upon the question of speed.

Upon his direct examination, he says: "At two o'clock there was a fresh breeze. I judged the vessel was going eight knots; and at 2.30 it commenced to moderate, and it moderated some after the fog shut down, and at daybreak it moderated still

more" (Page, Int. 37, p. 15). Then he says: "I couldn't judge correctly how fast we were going, — between five and six knots. It was smooth. The vessel was standing straight up. I had looked over her side sometime before that in regard to her speed, to see whether it was prudent to shorten sail, and I didn't. I considered it was just nice working speed. I could wear ship or tack ship or anything, and my yards were braced for that occasion in case I met another vessel, and she had the right of way" (Page, Int. 74, p. 17). His estimate is pure guess. "I judged at twelve o'clock she was going at about seven knots, at two o'clock I judged she was going about eight and one-half knots, and between two and three o'clock she was going seven, and so on down as it moderated" (*Id.*, Int. 79, p. 17).

His actions during the watch are better evidence than his interested guesses made on the witness stand.

(1) He looks over the side several times to see whether he is going too fast (Page, Ints. 349–352, p. 32).

(2) Between two and four o'clock he goes below and consults his chart three times at least, "to keep a run of my position, which I always try to do" (Page, Ints. 197–200, p. 24). Unless he was moving very rapidly in these two hours, why the constant reference to the chart? He knew he was rapidly approaching land, and must be on constant lookout for it. Such examination of the large coast chart is consistent only with rapid speed. He last examined it at 3.45 o'clock (Page, Ints. 188–195, p. 23).

But Captain Page finally admits his speed to be seven knots. Asked upon cross-examination: —

"*Q.* What were you reckoning your speed to be when you looked at your chart?

"*A.* About seven knots.

"*Q.* Did you use the lead any that night?

"*A.* I did not.

"*Q.* How could you tell how far you had changed your position from the time when you looked at the chart at one time until you looked at it the next time?

"*A.* Judging by the speed the vessel was going through the water.

"*Q.* How fast did you consider she was going?

"*A.* About seven knots.

"*Q.* So that when you would go below and look at your chart you would give your vessel's position as being seven miles ahead of where she was before that?

"*A.* Yes, sir.

"*Q.* Or, rather, at the rate, I would say, of seven miles an hour?

"*A.* Yes, sir."

Captain Page, Ints. 201–206, p. 24.

And it is significant in this connection that Captain Page thought that at the time of collision he was twenty-five miles southeast of the lightship (Page, Int. 85, p. 18), when, in fact, he was but eighteen miles; and he got an accurate observation on the previous noon (Page, Int. 156, p. 22). Since noon he had made seven miles more than he thought.

(*g*) The schooner must have been going faster than the steamship, because when the fog horn is heard on the latter she is off the port, and the wheel of the steamer is at once put hard a-port; notwithstanding the swing of the steamer to starboard, the schooner is going fast enough to offset the whole starboard swing of the steamer, and to get under the bow.

(*h*) There was no necessity nor excuse for refusal to reduce the speed of the schooner: sail could easily have been taken in. There was no danger of lee shore, or of inability to manœuvre to avoid collision. The wind was fresh and free. There was plenty of sea-room, with a smooth sea and summer weather.

3. *The speed of the schooner at the time and place and under the circumstances was immoderate and contrary to the Articles of Navigation.*

The then existing law was Article 13 of the Act of March 3, 1885: —.

"Art. 13. EVERY ship, *whether a sailing-ship or a steam-ship*, shall, in a fog, mist, or falling snow, go at a moderate speed." The rule leaves no question of the equal obligation upon the sailing-vessel with the steam-vessel to go at a moderate speed.

There is more reason for the requirement in the case of the sailing-vessel, because she cannot, like the steam-vessel, slacken speed, stop, or reverse, when the emergency arises. Her rudder, then, is her only weapon of defence. The steamer controls not only the wheel, but the engine.

That a rate of seven knots, or even six, per hour is not moderate speed for a steamship in a fog is authoritatively settled by the recent decisions of this Court.

A speed of six knots outside New York harbor is excessive. "Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage-way, which the Court finds in this case to be three miles an hour." — BROWN, J.

The *Martello*, 153 U.S. 64, 70.

So, a speed of six to seven knots off Cape May is immoderate.

The *Nacoochee*, 137 U.S. 330.
Colorado, 91 *Id.* 692.

"Five to six miles an hour is a questionable speed in a fog everywhere. The event here demonstrates that it was a reprehensible speed in the waters off Cape Henry, and it was gross fault on the part of this steamer. The speed was the cause of this collision." — HUGHES, J., in Circuit Court of Appeals for Fifth Circuit.

The *Michigan*, 63 Fed. Rep. 280, 287.

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, providing such approaching vessel is herself going at a moderate speed required by law." — BROWN, J.

The *Umbria*, 166 U.S. 404, 417.

4. *There is no distinction in the application of the rule between a steamship and a sailing-vessel.* The reason is the same, the ability to recognize it the same, and the circumstances substantially the same.

"The same principles are, of course, applicable to sailing-vessels."

Lowndes, Collision, p. 73.

"Ordinary prudence and good seamanship alike require a sailing-vessel navigating in foggy weather to go at a moderate rate of speed, and to use all possible precautions against col-

lisions by making some sort of detonating signal, whereby other ships may be apprised of its presence and situation; and this, irrespective of any rule on the subject, especially in a thoroughfare where other vessels may be expected to pass. A high rate of speed in a dense fog is less justifiable in a sailing-ship than in one propelled by steam, as she has less facilities for quickly stopping and changing her movements. The rule of moderate speed is enforced with the same or a greater degree of strictness in the case of sailing-vessels than in the case of steamships. They must reduce their speed when occasion demands, or abide the consequences of a failure to do so. Circumstances so unusual as to justify a sailing-vessel from taking the ordinary precautions to guard against collision by reducing speed, using a fog horn, or complying with other statutory requirements, would exonerate a steamer for violating the same rules under like circumstances."

Spencer, Collisions, Sect. 50.

"We hold that a steamer is bound in all places to go at a moderate rate of speed in a fog, and that a sailing-vessel is bound to do so in such a place as this" (off Chatham). — LOWELL, J.

The *Johns Hopkins*, 13 Fed. Rep. 185, 187.

Because "a rate of speed at night, in a dense fog, which is immoderate and excessive for a steamer, is less justifiable in a sailing-vessel under the same circumstances, as she has less facilities for quickly stopping and changing her movements;" and a speed of seven miles an hour in a fog in Long Island Sound is immoderate.

The *Rhode Island*, 17 Fed. Rep. 554.
Louisiana, 2 Ben. 371.
Chancellor, 4 *Id.* 153.

"And if the navigation of a sailing-vessel, as regards speed, is such that it must be held careless or reckless in reference to her duty to other sailing-vessels which she is likely to meet, it must be held careless and faulty in reference to steamers also, though the latter are bound to keep out of the way; for there cannot be two diverse rules as to prudence in navigation, applicable to the same vessel in the same situation; nor, as I have said above, was the rule requiring steamers to keep out of the way designed to encourage careless or reckless navigation in sailing-vessels, or to sanction a rate of speed as against steamers, which, as against sailing-vessels, must be condemned. To permit this would be to permit sailing-vessels to take advantage of the obligation imposed on steamers to go at moderate speed, and to keep out of the way, and increase the difficulties of steamers in doing so. To allow sailing-vessels to increase their own speed as that of steamers is diminished would tend directly to thwart the very object of the rule requiring moderate speed, — viz., to secure sufficient time to avoid collision, — and it would thus convert a rule designed to insure greater safety into an occasion of greater danger. The duty of steamers to keep out of the way is a correlative one, and presupposes that the sailing-vessel shall observe not only all the specific statutory rules, but all other general obligations of prudence and caution in navigation which the special circumstances demand. Among the latter must certainly be embraced a moderate rate of speed at night and in a fog, in a thoroughfare where numerous steamers and other vessels must be expected to be met; and a speed which is held immoderate for a steamer under such circumstances cannot be held moderate or permissable for a schooner." — BROWN, J.

The *Rhode Island*, 17 Fed. Rep. 554, 559.
Vesper, 9 *Id.* 569.

In the *Colorado*, 91 U.S. 692, the sailing-vessel was found to have been going at a moderate speed, especially because "all

her light sails had been taken in, as a matter of precaution, to lessen her speed, and to put the vessel more completely at the command of her helm." — CLIFFORD, J., p. 696.

A speed of six knots in a fog, under nearly full sail, off Cape May, is immoderate.

The *Wyanoke*, 40 Fed. Rep. 702.

The obligation under a similar rule is clearly defined and enforced in the English courts, in the jurisdiction to which this schooner belonged.

"The object of the rule is this: that when a fog comes on, it is the duty of the ship, whether she be a sailing-vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered." — Sir J. HANNEN.

The *Zadok*, 9 P. D. 114, 117.

"Speed other than what would allow this sailing-vessel to keep her steerage-way was not moderate." — BRETT, M. R.

"In a dense fog in the British Channel it is clear that a vessel must not go faster than will enable her to be kept under command." — BOWEN, L. J.

The *Beta*, 9 P. D. 134.

"If she is under full sail, she ought to take sail off till she brings herself as nearly to a standstill as is possible whilst being under command." — BRETT, M. R.

The *Dordogne*, 10 P. D. 6, 12.

"Putting all these things together, it seems to me, on the whole, that the rate of speed which is to be attributed to the sailing-vessel is something about four knots. Now, if that is so, was that too much? The law on the subject is quite clear. A sailing-ship is entitled to move at such a rate of speed as will enable her to keep properly under command; and I agree with, and accept the decisions which go to the effect that what is properly under command varies, and that, under some circumstances, a vessel may be entitled to go at a higher rate of speed than in others. . . . I do not profess myself to be able to say what rate of speed a sailing-vessel should have in order to keep well under command; but the Trinity Masters have considered the matter, and they tell me that if the speed of the vessel was about four knots, as I have found it to be, they do not think any blame attaches to the vessel for that rate of speed."—JEUNE, J.

The *N. Strong* (1892), Probate Rep., 105, 108.

And see

The *Virgil*, 2 W. Rob. 201.
Victoria, 3 *Id.* 49.
Pepperell, Swabey, 12.

That the immoderate speed of the schooner caused, or with her other faults contributed to, the collision is clear.

(*a*) It prevented the steamship from swinging clear under the port wheel.

(*b*) It caused the schooner to overtake the steamer, notwithstanding the latter's swing to starboard, and to get under the bows.

(*c*) It prevented the steamer from hearing and locating the fog horn earlier and oftener.

(*d*) Both Courts below find as a fact that the schooner's speed contributed to the collision.

Other Faults of the Schooner.

The Courts below having found the schooner guilty of immoderate speed, it was unnecessary for either Court to consider or rule upon the allegations and claim on the part of the steamship, that the schooner was guilty of other faults in her navigation. The points made in those Courts are repeated here because (1) if this Court shall reverse the decisions below on the matter of the schooner's speed, the Court, in justice to the rights of the steamship, will consider the evidence and claim regarding these other faults which it was not necessary to pass upon below; and (2) these faults may bear upon the equity of the equality of the division of damages raised by appellants.

The appellee for the steamship claimed and argued upon these faults: (1) *Want of proper lookout;* (2) *failure to sound the fog horn as required,* and (3) *refusal to starboard in time to avoid the collision.*

1. *Want of proper lookout and vigilance on the part of the schooner.*

The steamship must depend upon the evidence from the men on the schooner, and they differ in their statements.

Williams was the schooner's lookout from two to four o'clock; was on deck after twelve in the master's watch; and, called as a witness by the schooner, was in the best position of all witnesses to know how the schooner was navigated before the collision.

Especial attention, therefore, is called to his cross-examination regarding the navigation of the schooner during his watch.

"*Q.* Now, how many were on deck from two o'clock until four?

"*A.* The man at the wheel and me, sir.

"*Q.* Was the captain on deck?

"*A.* No, sir; not at two o'clock.

"*Q.* Did he come on deck before four?

"*A.* Yes, sir.

"*Q.* Now, when did the captain come on deck?

"*A.* I couldn't say exactly when he came on deck, but he came on deck, sir, after one bell, sir.

"*Q.* That is, after ten minutes to four?

"*A.* Yes, sir.

"*Q.* And did the mate come on deck?

"*A.* Yes, sir; the mate came on deck a few minutes before.

"*Q.* A few minutes before the captain?

"*A.* Yes, sir.

"*Q.* So that, from quarter of three until about quarter of four, you and the man at the wheel were the only two on deck?

"*A.* Yes, sir.

"*Q.* How soon after the mate came on deck did the captain come?

"*A.* Yes, sir.

"*Q.* How soon after? my question is.

"*A.* He came just after him, sir.

"*Q.* Was this after the one bell?

"*A.* Yes, sir.

"*Q.* Neither of them was on deck until after the one bell?

"*A.* No, sir.

"*Q.* And that sounded at ten minutes to four?

"*A.* Yes, sir.

"*Q.* Who was the man at the wheel?

"*A.* A Swede. I think his name is Broden.

"*Q.* Now, when it became foggy, there was no one on deck but you and the man at the wheel?

"*A.* No, sir.

"*Q.* Which of you was in command of the vessel, — you, or the man at the wheel?

"*A.* There was neither of us in command, so far as I know.

"*Q.* You didn't give him any orders, did you?

"*A.* No, sir.

"*Q.* Did he give you any?

"*A.* No, sir."

Williams, Ints. 63–81, pp. 63–64.

Captain Page claims that he was on deck during his watch from twelve to four o'clock, except as he went below several times to consult his chart (Page, Int. 31, p. 15; Ints. 188–199, p. 23). In this he is contradicted by Williams. Upon his own statement, he was below when the steamer was heard and reported (*Id.*, Int. 38). He was in the cabin when he heard Williams say, "There is a steamer." At that time "the man at the wheel was in command of the vessel; that was Broden" (Page, Ints. 219–221, p. 25).

The mate Mullins's watch did not begin until four o'clock. He was called before four, and came on deck about eight minutes to four o'clock (Mullins, Int. 30, p. 34). When he got on deck, the steamer's whistle had been heard. When the mate was called, Fred, the boatswain (presumably Broden), told him that a horn was heard a little on the lee bow. He then had to put on his shoes and hat, and get on deck (Mullins, Ints. 178–183, p. 41).

Wilson was in mate's watch, and did not come on deck until four o'clock — called ten minutes before; when he got on deck, the steamer's whistle had been heard (Wilson, Dep. Ints. 12–14, p. 53). After he was called he remained in the forecastle until four o'clock, and then went on deck to relieve Williams. He didn't see the mate forward until after this. The mate came forward after he relieved Williams (Wilson, Ints. 93–109, p. 58).

Abbott, the cook, turned out at one bell (ten minutes to four) to make coffee; came on deck, heard the steamer just as he went into the galley to light his fire, and then came out and remained somewhere about the deck until the collision (Abbott, Ints. 105–118, p. 51).

Broden's statement is simply that he was at the wheel from two o'clock until four A.M., or a few minutes before, when his watch was relieved, when he at once went below (Broden's statement, p. 67).

Coleman relieved Broden, and took the wheel at four A.M., and remained at it until the collision at 4.10 A.M. (Coleman's statement, p. 68).

It seems, then, that — at least from the time the fog shut in, about three o'clock, until the steamer was heard — there was no officer in command on the schooner's deck, if we believe the lookout Williams. If we believe the master, Captain Page, he was intermittently on deck, and assumed that when he went below, the man at the wheel, whom he says he regarded as boatswain, had command. "*Q.* When you went below, who had charge of the deck? *A.* The man Broden; he acted as boatswain" (Page, Int. 34, p. 15). Broden claims no such authority, and Williams expressly says no one was in command. "There was neither of us in command, as far as I know." (Williams, Ints. 77-81, p. 64).

The schooner's evidence is agreed that, at the critical moment when the steamer is heard in the fog, only the man at the wheel and the lookout are on deck, and neither of them in command. The lookout took the fog horn of his own accord, without orders, and Broden was supreme at the wheel. "*Q.* What suggested to you getting the horn at quarter to three? *A.* I started to blow the horn on my own account as soon as it became foggy" (Williams, Int. 82, p. 64).

This was the navigation, or absence of proper navigation, for the hour preceding the collision: a vessel left to the lookout to use his judgment and convenience in blowing the fog horn, and the man at the wheel to steer as he saw fit.

The result might be expected. In the absence of any officer, the whistle of the steamer is heard. The situation is critical; the vessels are approaching, as Judge NELSON finds, at a speed of eighteen or nineteen knots an hour, — a mile in three to four minutes. In this situation, with only two men on the deck of the schooner, with no officer in command, the lookout has to desert his post and his fog horn (at the very moment when it was most important to sound it and keep an alert lookout), and

come aft, take the wheel, and send Broden down into the cabin to call master and mate. During this critical time, as the vessels were approaching in the fog, Williams was the only seaman on deck, and busy at the wheel. During that time no fog horn was sounded, and no lookout kept.

The situation is stated by Williams upon cross-examination: —

"*Q.* Did you blow it all the time during that hour?

"*A.* Yes, sir; till one bell struck, and I had to go and relieve the man at the wheel to call the watch.

"*Q.* And when one bell was struck, no one was blowing the horn?

"*A.* No, sir.

"*Q.* And when you went aft, until he came forward, there was no one forward on the vessel?

"*A.* No, sir.

"*Q.* And that was somewhere between ten minutes to four and four o'clock?

"*A.* Yes, sir.

"*Q.* For how many minutes was there no one on the forward part of the vessel?

"*A.* About two or three minutes.

"*Q.* Did you give any orders to the man that relieved you?

"*A.* I gave him orders to report steam whistles.

"*Q.* You didn't report it yourself?

"*A.* No, sir. He went down below and called the captain and called the mate. I told him to report it.

"*Q.* That was at one bell?

"*A.* Yes, sir. I always used to take the wheel at one bell, while he went and called the mate.

"*Q.* Who was the man you are speaking of, who called the master and mate?

"*A.* Broden.

"*Q.* The man who was at the wheel?

"*A.* The man at the wheel.

"*Q.* Then you went and took the wheel, and he was down below, calling the master and mate?

"*A.* Yes, sir.

"*Q.* And that was after you heard the steamer?

"*A.* Yes, sir.

"*Q.* How long after you took the wheel was it?

"*A.* After I heard the steamer, — it was about four or five minutes after.

"*Q.* It was four or five minutes after you heard the steamer before the captain came on deck?

"*A.* Yes, sir; and then it was just as much as I could make it out then that it was a whistle.

"*Q.* But you were sufficiently certain that it was a steamer to send down for the captain and the mate?

"*A.* Yes, sir.

"*Q.* That was your whole object in sending the man at the wheel down below, wasn't it?

"*A.* Yes, sir.

"*Q.* Because you thought you were approaching some other vessel?

"*A.* Yes, sir."

Williams, Ints. 95–111, pp. 65, 66.

Captain Page practically corroborates this: —

"*Q.* Who was there forward when you went forward after coming up from the cabin?

"*A.* There was no one there for about one minute.

"*Q.* When you came up from your cabin, there was not any one forward of your quarter deck?

"*A.* No, sir.

"*Q.* And until you went forward, you were the only person forward?

"*A.* Yes, sir.

"*Q.* Then, from the time you went forward until Williams got there, your fog horn was not blown?

"*A.* No, sir; it was only about two minutes."

Page, Ints. 238–248, p. 26.

This absence of the officer from the deck, and the consequent necessity of abandoning the lookout in order to take the wheel while the man at the wheel went below to call the officers, were gross negligence in the management and navigation of the schooner.

"The officer in charge should be always on deck; he should not leave the deck in charge of a junior officer when another vessel is approaching, so as to involve risk of collision."

Marsden, Collision, p. 439.
The *Arthur Gordon*, Cush. 270.
Khedive, 5 App. Cas. 876.
Zadok, 9 P. D. 114, 118.

"The conduct of the captain in going below during his watch, and not remaining on deck to see that the seamen were at their posts and attending to their duty, was hardly consistent with good seamanship." — TANEY, C. J.

Peck *vs.* Sanderson, 17 How. 178, 182.
The *Charles L. Jeffrey*, 55 Fed. Rep. 685.
City of Augusta, 80 *Id.* 297.

2. *The schooner's fog horn.*

(*a*) The witnesses from the steamship agree that one single blast of the fog horn, presumably from this schooner, was heard. Captain Savage thought he heard a second signal on his beam. This probably was from the other vessel heard after the collision. The captain, first officer, second officer, lookout, and quartermaster are all on deck, attentive to duty, and hear the single blast of the fog horn on the port bow.

Captain Savage, Ints. 45–50, pp. 70, 71.
1st officer Howlett, Ints. 33–39, p. 82.
2d officer Jensen, Ints. 15–21, p. 87.
Lookout Wall, Ints. 21–33, p. 90.
Quartermaster Jones, Ints. 19–23, p. 94.

That a fog signal is not heard is not conclusive proof that it is not sounded. Aberration of sound may account for the inability to hear. But, in view of the fact that one blast of the horn was heard, and in view of the evidence regarding the then management of the schooner, the fact that only one blast was heard is strong evidence that only one blast was sounded while the steamer was within hearing distance.

(*b*) The schooner's fog horn was of an old patent, working with a piston pressed down a tube lashed to the windlass. The sound was made by both hands pressing down the piston the length of the tube. It was purchased as an old horn from another vessel. The duration of the blast depended upon the time occupied in pressing down the piston; the quicker the pressure, the shorter the blast.

See Captain Page, Ints. 308–329, pp. 30, 31.
Mullins, Ints. 198–209, pp. 42, 43.

(*c*) The fog began about three o'clock. Williams, on lookout, of his own volition, began to blow the fog horn. It was the first time he ever used it (Williams, Int. 86, p. 64). He says he blew it until one bell struck (3.50 A.M.), when he had to go and relieve the man at the wheel. This was after the steamer's whistle had been heard. For two or three minutes there was no one forward (*Id.*, Ints. 94–100, p. 65). For this space of time, whatever its duration, no fog horn was sounded on the

schooner. It was just the time when, if blown, it would have been heard by and guided the steamer.

The mate Mullins comes on deck some time before four o'clock, after the steamer is heard, and hauls in the log, while Wilson at four goes on lookout. The mate apparently then goes forward, and takes the fog horn from Wilson. "I blew the horn myself then, and Wilson kept a lookout" (Mullins, Ints. 67–69, p. 36). "I took it because I could blow it louder than he could, I thought. Because it held considerable wind, and I was stronger, and I knew just how to blow it, and blow it properly" (Int. 230, p. 44). Wilson thinks he blew it twice (Ints. 37–38, p. 55). The mate blew it twice before the collision (*Id.*, p. 4). "He said he would blow the horn for a couple of blasts" (Wilson, Ints. 37–38, p. 55). Three different men, then, were working, or trying to work, this fog horn after the steamer had been heard. Why did the mate take it at the last moment, if the lookout was blowing it properly? Besides, there is the admitted intermission of uncertain duration when Williams went aft to take the wheel, and have the officers called.

3. *Schooner's refusal to starboard after seeing the steamer trying to avoid her.*

The evidence is from Captain Page. He says he saw the steamer off his starboard some two thousand feet. Probably, as the steamer was heard fifteen or twenty minutes before collision, she was seen much farther off. This is also shown by the number of points the steamer swung under the port wheel, and she was seen before she began to turn. He says, "I noticed she was coming directly at us, head for us, and shortly directed her course to starboard (that is, he ported his helm). I noticed that she was swinging to starboard" (Page, Ints. 64–68, p. 17). She was then twelve hundred feet distant. The mate

sung out, "Hard down the helm" (that is, starboard); and the master, notwithstanding the advice, ordered man at wheel to hold his course (Page, Int. 89, p. 18); and, notwithstanding his knowledge of the approach and swinging of the steamer for the obvious purpose of avoiding him, obstinately keeps on and runs under the steamer's bow.

Upon cross-examination he testifies: —

"*Q.* How near to you should you judge the steamer was when you saw she was swinging to starboard?

"*A.* About twelve hundred feet.

"*Q.* So that for eight hundred feet she came right on, and then began to swing to starboard?

"*A.* Yes, sir.

"*Q.* And very soon she began to head for you, head on?

"*A.* Yes, sir.

"*Q.* Why didn't you starboard your wheel?

"*A.* It was not my place to do it.

"*Q.* And was that the only reason why you didn't do it?

"*A.* Yes, sir.

"*Q.* And from that time until you saw her under the port wheel, although your mate told you it was a proper thing to do, you refused to put your wheel to starboard?

"*A.* I did, because I was doing what was right.

"*Q.* You meant to keep on, whether the steamer went through you or not?

"*A.* I had the right of way.

"*Q.* Exactly; and you meant to keep it, whether you cut the steamer down, or whether the steamer cut you down? You were going to Boston?

"*A.* I was going to Boston, and I had the right of way.

"*Q.* And you were not going to stop for anything in front of you?

"*A.* I was going to change for anything that had the right of way of me.

"*Q.* You could have steered either way?

"*A.* Yes, sir."

Page, Ints. 263–273, pp. 27, 28.

From the master's estimate of time and distance, with a free wind and a speed of seven knots, with equal ability with his spread of canvas to turn in either direction, advised by his mate to starboard, seeing the steamer swinging to starboard and trying to avoid him, knowing the steamer was near and porting, and changing her course solely for this purpose, — yet, with every means of assisting her, he keeps on his course, comes up with the swinging steamer, and puts himself under her bows.

While undoubtedly the duty of the schooner, under ordinary circumstances, was, under Article 22, to hold her course, the special circumstances existing here show that, when she saw the steamship swinging to starboard under the port wheel, for the purpose of avoiding collision, the schooner should have starboarded to assist the endeavor of the steamship to keep out of her way. The schooner, with full knowledge of the situation, and ability to control it, was then under Articles 23 and 24 : —

"Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Art. 24. Nothing in these rules shall exonerate any ship, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Act of Mch. 3, 1885. 23 Sts. at large, 442.

The schooner's only excuse is the statutory duty of keeping her course. But no such duty then existed. The circumstances were special, and the statutory duty was to alter her course. It was the very case to which Articles 23 and 24 were made to apply.

"Even flagrant fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision."

The *Maria Martin*, 12 Wall. 31.
America, 92 U. S. 432, 438.
Sunnyside, 91 U. S. 208.

"While the general rule is, that the sailing-vessel should keep her course, this rule presupposes that the steamer discovered, or ought to have discovered, the sailing-vessel at a sufficient distance to avoid her by changing her own course. But where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object. Experienced seamen testify that the mode adopted on the part of the 'Columbus' was the usual and best one, and we see no reason to doubt it. And if the 'Columbus' had been seen from the 'Missouri' when the engine was stopped, she might, it appears, have passed her in safety. Not a moment appears to have been lost on board of the steamer in giving or in executing the orders which the occasion called for, and we think she is not in any degree responsible for the disaster." — TANEY, C. J.

Peck *vs.* Sanderson, 17 How. 178, 182.

"There is no idea appertaining to keeping a course which justifies holding to it in such way as to bring on a peril. The only principle inherent in it is to so act as to enable the other vessel, on whom the duty rests, to adopt with success means of getting out of the way." — BLATCHFORD, J.

The *Elizabeth Jones*, 112 U.S. 514, 524.

"You may depart, and you must depart, from a rule if you see with perfect clearness, almost amounting to certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it; and, indeed, this is provided for by the article." And, again, "You have no right to stand in a difficulty upon a right, though it may be a perfectly good right, obstinately, recklessly, and regardless of the safety of others." — Dr. LUSHINGTON.

The *Boanerges*, 2 Mar. Law Cas. 239.
Legatus, Holt, 217.

"Although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of a vessel of another, where he could avoid the injury by pursuing a different course." — BEST, C. J.

Handayside *vs.* Wilson, 3 Car. & P. 528.

"Each case depends entirely on its particular circumstances, — the position and distance of the vessels." — ESHER, M. R.

The *Vindomora*, 14 P. D. 172.
Zadok, 9 *Id.*, 114.

II.

FAULTS ON THE PART OF THE STEAMSHIP.

The appellee did not appeal from the decree of the District Court finding the steamship in fault for immoderate speed. This and the other faults alleged by the appellants are, however,

important as bearing upon the faults of the schooner and the effect of them in causing or contributing to the collision. Consideration of them may also be of consequence upon the equitable division of damages. For these reasons reference is here made to the evidence of fault on the part of the steamship.

(1) *Speed of steamship.*

The facts as stated by the master and officers of the steamship are not contradicted.

The steamship had been going at a rate of ten or eleven miles an hour, and it is not contended that this was moderate speed in a fog, within the meaning of the rule and the decisions under it. It was contended that the rate of speed did not contribute to the collision.

A single blast of a fog horn was heard somewhere off the port bow of steamship. The order was immediately given and obeyed to stop and reverse. Under the reversed engine the speed was reduced, between the time the fog horn is heard and the schooner seen, to four or five miles an hour (Captain Savage, Ints. 51–63, p. 71). The engine was stopped and reversed at 3.55 o'clock (Engineer Henry, Ints 12–22, p. 98; engineer's log book, p. 98). This was some minutes before the collision. The reduction in speed shows that the steamship was under perfect control, and could have stopped, and would have done so, had she not been deceived by the single blast of the fog horn on the port and by the speed of the schooner. The sudden appearance of the schooner attempting to cross the course of the steamer obliged the latter to start full speed, and continue under the port wheel, in hopes of passing the schooner.

The facts are testified to by the officers and crew of the steamship.

Captain Savage, Ints. 49–97, pp. 71–73.
1st officer Howlett, Ints. 34–74, pp. 82–84.
2d officer Jensen, Ints. 15–30, pp. 87–88.
Lookout Wall, Ints. 15–48, pp. 89–91.
Quartermaster Jones, Ints. 19–43, pp. 94–95.

The one blast heard indicated that the vessel was on the starboard tack; that is, heading between southeast and south, and off the port bow. The swinging to starboard under the port wheel would tend still further to separate the vessels, and the quick obedience to her engine would have brought the steamship to a full stop before the vessels came in sight. The trouble, therefore, was not in the rate of speed, which was under control, but in the false signal from the schooner and her excessive speed. These are discussed later.

As showing that the steamship was under perfect control, attention is called to the testimony of Wilson, lookout on the schooner and in the best position to know, who says the speed of the steamer was about seven knots (Wilson, Int. 47, p. 55), and this was after she had started up full speed ahead. She had not recovered her headway.

The fact of collision shows that at the time the steamer could not be going as fast as the schooner. The schooner is heard a point off the port bow, and the steamer puts wheel hard a-port, and continues to swing to starboard until the collision; so that during this time the schooner must go fast enough to make the one point and the additional distance made by the steamer's swing to starboard.

The more the steamer got round to the northward and angled forward when the vessels came together, the slower the steamer and the faster the schooner were going.

(2) *Steamship not stopping and reversing.*

The answer is, she did stop and reverse the moment she heard the fog horn. The fact is proved beyond question by the officers and men on the steamer (see evidence cited, *supra*).

Having given the order to stop and reverse, the master would not have changed the order but for the fault of the schooner. The schooner was not on the course she signalled, and was not going at a moderate speed; so that when discovered,

the master in the exercise of his best judgment, under circumstances *in extremis*, had to ring up as the only chance to get by.

Having taken due precaution to stop and reverse, it will not be presumed that the master afterward changed the order except under necessity. His conduct shows vigilance, alertness, and honest endeavor to avoid a collision made possible by the fault of the schooner.

(3) *Steamship's lookout.*

The evidence regarding this comes necessarily from the steamship.

Her navigation during the night and morning is stated by her witnesses.

During the evening, for greater precaution, the steamship took the outside route, instead of the usual course through Vineyard Sound. Her master, an experienced captain, was in command, and, with the first officer, was in the open pilot house. The second officer came in before the schooner was heard. Wall, an experienced seaman, had been stationed as lookout since two o'clock. A proper quartermaster was at the wheel.

A single blast of the fog horn is heard three-quarters or one point off the port bow, by the lookout, and reported soon after the bell sounded to call the watch at 3.50 o'clock (Wall, Ints. 23–40, pp. 90, 91). The first officer replied all right (*Id.*). The master also heard this single blast (Savage, Ints. 45–50, p. 71). The first officer heard it a point on the port bow (Howlett, Ints. 34–39, p. 82). The second officer heard it one or one and one-half points off the port bow (Jensen, Ints. 15–23, pp. 87–88). The quartermaster locates it about a point on the port bow (Jones, Ints. 15–25, p. 94).

Were these officers and men all inattentive? Could they have mistaken the sound? On the contrary, the time, the distance, the orders on board the steamship, all indicate attention and quick effort to avoid collision.

After the blast was heard, and the speed and course of the steamship changed to avoid it, there is every presumption of attention to hear and see the vessel. The steamship must locate the vessel, if only to come back to her course and speed.

The schooner was white, with a spread of white sails, and very low in the water. She was seen looming up in the fog, soon after the fog horn was heard, by all the men on steamer's deck. It is impossible to hold that she was not seen as soon as she could be. No other object attracted the attention of the steamship. She was under a reversed engine and a hard-to-port wheel, and obviously on the watch to find and avoid the sailing-vessel.

The failure to hear the fog horn on the steamer, even if in fact it was blown as required, is not necessarily negligence. It is well recognized that atmospheric and natural causes may prevent the hearing of a fog horn by the most attentive listener. The question is not, Did we *hear?* but Did we *listen?* If we used proper effort, and gave proper attention, and were unable to hear, there was no fault.

So, failure to see lights at night is not necessarily negligence. The question is not, Did you *see?* but Did you *look?*

"If the lookout was competent, and at his proper post, the presumption of law that he did his duty is not, we think, overcome by the fact that he did not see the lights of the brig until just before the collision."— Woods, J.

The *Annie Lindsay*, 104 U.S. 185, 191.
Johns Hopkins, 13 Fed. Rep. 185.
Negaunee, 20 *Id.*, 918.
L. D. Baker, 24 *Id.*, 814.

"It was from no want of proper vigilance on the part of those on board the 'Iduna' that the fog horn was not heard, and

therefore their conduct must be judged precisely as though no fog horn had been blown at all." — Sir J. HANNEN.

The *Zadok*, 9 P. D. 114, 118.

"I desire to say emphatically that it is impossible to infer, from the fact that a whistle is not heard in a fog, that therefore there is an inefficient lookout on the vessel which does not hear it." — Sir J. HANNEN.

The *Rosetta*, 59 L. T. (N. S.) 342, 344.

(4) *Steamship's porting instead of starboarding.*

(5) *Trying to cross the schooner's bow.*

These two charges may be considered together.

It is true, the wheel of the steamship was put hard to port as soon as the fog horn was heard, and kept there until the collision.

All the witnesses from the steamship say the horn was heard about a point off the port bow. As the schooner's witnesses all heard the steamer on the starboard, the schooner was necessarily on the steamer's port. The single blast heard indicated a vessel on the starboard tack; that is, sailing southeast or southerly of that.

With a vessel off the port bow, heading southeast, on the starboard tack, there can be no question that the port wheel was proper. Every turn of it turned the steamer from the approaching vessel, and made collision impossible.

Every turn of the wheel to starboard would turn the steamer towards the sound of the unseen vessel, and have been improper navigation.

With the duty of keeping out of the way, and the right to do it on either side or in any way, it was proper for the steamer to turn from the sound rather than towards it.

When the schooner was seen, the steamer was swinging under the hard-to-port wheel, and it was too late to change the manœuvre with success. The only safety was in continuing to swing to starboard, and put on full speed; and this would have been successful but for the speed of the schooner, and her refusal to assist the steamer by starboarding and swinging to port away from the steamer.

Under such circumstances much must be left to the judgment of the master. He explains the reason for porting the wheel (Ints. 70–90, pp. 72–73). He says that he ported when he heard the fog horn off the port to swing away from it. After he saw the schooner, it was too late to starboard. If he made such a change, the schooner would sink the steamer. "I wanted to swing fast enough to swing on the same angle with him if possible" (Savage, Int. 79, p. 72). The attempt was, not to cross the schooner's bow, but to swing round on a parallel line on the schooner's starboard side. The angle of collision, with the steamer glancing forward, shows that the manœuvre was very nearly successful. A little assistance from the schooner would have accomplished it.

The act of the master must be judged from his point of view, and from the facts and situation as they appeared to him, not from the facts as they may afterwards be proved.

"After a misfortune has happened, it is easy to see how it might have been avoided. . . . But this is not a fair mode of trying the case." — McLean, J.

Goslee *vs.* Shute, 18 How. 463, 466.

"We do not see how the Court could find otherwise than that they were free from fault or negligence. Perhaps they might

have done something else which would have been better. The event is always a great teacher. . . . But these possibilities are not the *criteria* by which they are to be judged. The question is, Did they do all that reasonable prudence required them to do under the circumstances?" — BRADLEY, J.

The *Nevada*, 106 U.S. 154, 157.

The schooner's witnesses are in doubt whether, if steamer had starboarded, the collision would have been avoided. "She might possibly have cleared us; it is hard to tell" (Mate Mullins, Int. 99, p. 37). "She might have cleared us, and might not, I couldn't say; probably she may have" (Lookout Wilson, Int. 61, p. 56). Clearly this is mere matter of guess-work, which will not outweigh the deliberate and responsible judgment of the master.

III.

The Division of Damages.

The appellee has not appealed from the decree imposing equal division of damages. It has assumed, under the cases cited below, that mutual fault for collisions always imposed equal division of the loss, without inquiry into the question of degree of fault. The admiralty principle of equal division where both vessels are in fault is certainly more favorable to the libelling vessel than would be the common law rule that contributory negligence defeats the action. Had these appellants sued at the common law, they would have recovered nothing.

1. If the court departs from the previous practice and apportions the damages otherwise than in equal division, it should consider the evidence in regard to each fault and the degree of such fault, and then appraise the relative importance and effect of each.

The schooner alleges and attempts to prove *five* faults against the steamship (Libel, pp. 2, 3). The steamship alleges *four* faults against the schooner (Answer, pp. 5, 6). Upon the record in the case it is submitted that the schooner was more in fault than the steamship, because she was not only going as fast as she could in the fog with no attempt to reduce her speed, but she was doing this with no officer on deck, and no one on the lookout forward at the critical moment of the approach of the steamship. As each vessel was found guilty of the same fault (immoderate speed) and, of course, in the same place and weather, and each was violating the same laws of navigation, it is difficult to see the equity of imposing a greater liability in the division of the damage upon the steamship than is imposed upon the schooner. It is equally difficult to see upon what basis and in what proportion any unequal division can in the equity of the admiralty be made.

2. The libellants sue as "sole owners of the schooner," "*for and in behalf of themselves, and as the lawful bailees of the cargo of sugar and molasses late on board of said 'Golden Rule'*" (Libel, Record, p. 2). Millard, one of the two owners of the schooner, was also the owner and consignee of part of the cargo, the agreed value of his consignment being $929.90. Owners of schooner bring admiralty proceeding to recover the entire loss to both schooner and cargo. The Court decided, in this proceeding by them, that each vessel was in fault, and under equal liability for the aggregate damage. If steamship had been injured, one-half of her damage could be charged

to the schooner. Steamship and schooner were joint tort-feasors, not in contract relation, but under a liability to be assessed and distributed as between them, according to the equitable principles recognized in the admiralty as the "Chancery Court of the Sea." Were the action at common law, the contributory negligence of the libellants would bar recovery of any damages for the loss of their vessel. The Court, with its equity jurisdiction, divided the damage. As the vessel, freight, etc., were worth more than the cargo, upon this division the steamship, after paying the whole value of cargo, and deducting one-half in recoupment from half the value of schooner, freight, etc., still owes the schooner $597.87. The decree of the Court follows in form and principle the practice in the First Circuit recognized and enforced by Judge LOWELL in the "Hercules," 20 Fed. Rep. 205.

This equity of divided damage — that is, of requiring as between two tort-feasors in the admiralty as equal a distribution of the loss as can be decreed — has been the settled equity of the English Admiralty since the *dicta* of Sir WILLIAM SCOTT, in the Woodrop Sims, 2 Dods. Adm. 83, accepted in the House of Lords in 1824, in Hay *vs.* Le Neve, 2 Shaw Scotch App. Cas. 395.

In the latest English case Lord BLACKBURN says: —

"When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of admiralty and the rule of common law. The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident, — the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotch-potch, and divided between the two. Until the case of Hay *vs.* Le Neve, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now

it is, I think, quite settled, and there is no dispute about it, that the rule of the admiralty is, that if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law is that, if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

Cayzer *vs.* Carron Co., 9 App. Cas. 873, 881.

"The principle of the rule (of divided damage) is said to be equality of participation in a loss arising from a common fault."

Marsden, Collision, p. 136.

The rule was first accepted by the United States Supreme Court, in

The *Catharine*, 17 How. 170,

because "under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in the navigation." — Mr. Justice NELSON, p. 177.

The equity of such a division of damage, caused by mutual fault, has been recognized and enforced in many later decisions. See

The *Continental*, 14 Wall. 355.
Washington & Gregory, 9 *Id.*, 513.
Atlee *vs.* Packet Company, 21 *Id.*, 389.
The *Sunnyside*, 91 U.S. 208.
Alabama, 92 *Id.*, 695.

Juniata, 93 *Id.*, 337.
Stephen Morgan, 94 *Id.*, 599.
Virginia Ehrman, 97 *Id.*, 309.
City of Hartford, *Id.*, 323.
Connecticut, 103 *Id.*, 710.
Potomac, 105 *Id.*, 630.
Sterling, 106 *Id.*, 647.
Max Morris, 137 *Id.*, 1.

Spencer states the rule, "Where two or more vessels are equally at fault, and liable in damages to another, the owner of the latter, or its cargo, may proceed against the offending vessels, jointly or separately, to recover the *entire loss*, and no apportionment of the loss between the offending vessels will be made so far as the right of entire recovery of the injured vessel is concerned; but, as between themselves, the offending vessels may require an apportionment of the loss."

Spencer, Collisions, Sect. 191,

citing

The *Franconia*, 16 Fed. Rep. 149.
Briggs *vs.* Day, 21 *Id.*, 727.
Troy, 28 *Id.*, 861.
Britannia, 39 *Id.*, 395.

This equity of equal division of the loss, when caused by mutual fault, is not affected by statute limitation of liability, at least, not until the balance is struck between the two offending vessels. This was settled by

The *North Star*, 106 U.S. 17.

"The rule of admiralty in collision cases, as we understand it, is that, where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. . . . These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass, and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties." — Mr. Justice BRADLEY.

The *North Star*, 106 U.S. 17, 20, 22.
Atlas, 93 *Id.*, 302, 313.
Manitoba, 122 *Id.*, 97.

And see

Stoomvaart, etc., *vs.* P. & O. Steam Navigation Co., 7 App. Cas. 795.

That is, the primary question — in the case at bar upon this point the only question — is, What does the one vessel owe to the other upon the mutual accounting for joint fault? The question of exemption or limitation arises only after the amount of the debt is fixed between them. In this mutual accounting the whole damage, whether to both or either vessel, or to the cargoes, must be considered and adjusted.

3. The Harter Act (Chapter 105, Act of February 13, 1893) does not change the equity of equal division of loss between two offending vessels. That Act relates simply to the contractual relations between a cargo and its carrier. It has no application to an outside third party. The Act, in effect, substitutes a statutory for a contract bill of lading. It does not affect the tort liability for damage done by another vessel. This steamship gains no benefit from any contract or statute exemption existing between the schooner and her cargo. Nor does the schooner acquire any added right as against the steamship by reason of such exemption. The joint damage done by the mutual fault is adjusted (so far as the steamship is concerned) as between the two vessels, not as between the schooner and her cargo. The relation of that cargo to the schooner no more concerns the steamship than does the question whether the cargo or schooner was protected by insurance, by English Exempting Bill of Lading, or by the Limited Liability Act of 1851. The question now before the Court is not, what do we owe the cargo, but what in equity do we owe the schooner?

This Court has decided that the Harter Act merely affects the relative rights existing between a vessel and her cargo, and "the statute does not affect the liability of a vessel to other vessels with which she may come in collision."

"The act was an outgrowth of attempts made in recent years to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the Courts of England, if not of this country, to be valid as contracts, and to be respected even when they exempted the ship from the consequences of her own negligence. . . . These provisions (of the statute) have no possible application to the relations of one vessel to another, and are mainly a re-enactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes. The

fact, too, that by Section 6 the various sections of the Revised Statutes which embody the Limited Liability Act are preserved unimpaired, would seem to indicate that the later act was not intended to receive the broad construction claimed."—Mr. Justice BROWN.

The *Delaware*, 161 U.S. 459, 471.

IV.

APPLICATION OF THE HARTER ACT.

The appellee further submits that the Harter Act (Chap. 105, Act of February 13, 1893) does not apply to this British schooner on her foreign voyage from Porto Rico to Boston. The obvious purpose of the Harter Act, as stated in the "Delaware" (*supra*), was to relieve ship-owners to a certain extent from the inability imposed by judicial decision to contract against liability for the negligent acts of agents in the navigation of the vessel. (Liverpool, etc., Co. *vs.* Phœnix Insurance Co., 129 U.S. 397). It was unnecessary to give this statute relief to a British vessel, because her owner, under English law, could secure it by contract. The common law principle which the act was intended to modify was only of local recognition and application.

The language of the Harter Act does not justify its broad application to all and any vessels of whatever nationality as contended by appellants. The act is "an Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property." The

first section forbids "the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports," from inserting exemption of liability for loss from negligence in the loading, stowing, and delivery of cargo. Section 2 applies to "any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports." Section 3, creating the limitation of liability, is applied in the same language to the same class of vessels. Section 4 requires that vessels, again described in the same language, shall issue bills of lading. Section 5 imposes upon "the agent, owner, or master of the vessel guilty of violation" of the provision, a fine which "shall be a lien upon the vessel." While it is true the words "any vessel" are used in the act, they will be construed in view of the intention of Congress in the new legislation, and the purpose sought to be accomplished, and should be limited to such purpose. There is no presumption that Congress was legislating for the whole commercial world. The fair presumption is that it was providing for our own commerce, directing the form of our own bills of lading, and imposing the liability to fine upon our own vessels. Section 5, prescribing a fine of two thousand dollars upon any vessel violating the act, certainly could not be enforced against a foreign vessel outside the jurisdiction.

The application of the Harter Act to foreign vessels was made by Judge BROWN in the "Etona," 64 Fed. Rep. 880, and was recognized in the Circuit Court of Appeal for the Second Circuit in the "Silvia," 68 Fed. Rep. 230. These decisions are based upon the analogy between the Harter Act and the Limited Liability Act of 1851, and the application of the latter to foreign vessels under the decision in the "Scotland," 105, U.S. 24. It is submitted that the two acts are not analagous. The Limited Liability Act, as stated by Mr. Justice BRADLEY in the

case of the "Scotland," and in repeated cases, was a statute recognition of a principle of general maritime law, and Congress might well be considered as intending to give its benefits to all vessels without regard to nationality. But it cannot be presumed that Congress intended to regulate the form and issue of a bill of lading by a foreign vessel without expressing any limitation of the port where, or the citizenship of the person to whom, such bill of lading was to be issued, and then impose an uncollectable fine for violation. In fact, in the case of the "Scotland" (a collision tort committed upon the high seas), Mr. Justice BRADLEY expressly recognizes the distinction. He says (105 U.S. 30): "Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, *charter party*, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners."

It is submitted that the history, purpose, and language of the Harter Act indicate an intention to benefit the commerce of the United States rather than to impose burdens upon it, or allow a privilege to a foreign vessel at the expense of a domestic vessel. As Judge PUTNAM, in the opinion of the Court in this case, said: "While the statute in question by its letter applies to any vessel 'transporting merchandise or property to or from any port in the United States,' we are not prepared to determine that its benefits were intended to extend to foreign vessels; if it does, the result of the schooner's proposition would be that a provision of statute, historically known to have been intended for the encouragement of our domestic commerce, doubles, in the present case, the burden which the general admiralty law imposes on a domestic vessel, for the sole benefit of the owners of a foreign one" (Record, p. 108).

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